



FINDINGS OF FACT

Claimant was 23 years-old when she testified at the preliminary hearing. She commenced employment with respondent as a full-time associate on February 26, 2010. Approximately three to four weeks later, claimant was promoted to an assistant manager in training.

In the driveway of her home on May 10, 2010, claimant fell while exiting her then-fiance's truck. She landed on her left wrist. Claimant was diagnosed with a fracture of her left distal radius and ulnar styloid (a so-called Colles fracture), which was treated surgically by Dr. Brett Wallace, an orthopedic surgeon, on May 12, 2010. The surgery consisted of an open reduction and internal fixation of the fracture, which required the installation, with screws, of a cortical stabilizing plate.

Following the surgery, claimant returned to work for respondent on approximately July 26, 2010, with temporary restrictions from Dr. Wallace of "no repetitive use of L upper extremity, no lifting more than 20lbs X 1 month then resume normal duties."<sup>3</sup> When claimant was last seen by Dr. Wallace in July 2010 for treatment of the left forearm fracture, the doctor informed her that it would be several months before the effects of the fracture would subside completely, and that the residual symptoms should improve every month.<sup>4</sup>

When she returned to work claimant was only working part-time hours but she was still considered a full-time employee. Claimant testified that her left wrist was not pain free when she returned to work in July 2010. By August 16, 2010, she was back performing regular-duty work for respondent.<sup>5</sup>

Claimant described her accident as follows:

I was working in the store with a fellow associate and assistant manager and was instructed by another associate and assistant manager to go clean shelves lifting them up, putting them on a rack, dusting everything off and then replacing them. Then I also was asked to go take care of the coffee pots. I informed them that my wrist was hurting. I lifted up two coffee pots up to about my shoulder --<sup>6</sup>

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<sup>3</sup> P.H. Trans., Resp. Ex. A.

<sup>4</sup> P.H. Trans. at 22.

<sup>5</sup> *Id.* at 31-32.

<sup>6</sup> *Id.* at 9.

I picked up two full pots of coffee that just got done brewing to put them on the hot burners and I lifted them straight up to move them to be careful of customers, and my wrist snapped down and I heard a pop and it started pulsing from my fingers all the way up through my elbow. It seemed like it was burning.<sup>7</sup>

Claimant also experienced a grinding sound in her left wrist and numbness in her left hand. The record does not reveal the dimensions of the coffee pots or their approximate weight.

Claimant sought medical treatment at St. Francis Hospital on August 16, 2010. Respondent thereafter authorized medical treatment with Dr. Chris Fevurly commencing on September 24, 2010. Dr. Fevurly noted in his initial chart entry that “[i]t is pretty clear that we have had an acute aggravation of the preexisting left wrist syndrome and it would also appear that she had not had total or complete resolution of her left distal forearm and wrist complaints when she returned to work in early August, 2010.”<sup>8</sup> Dr. Fevurly provided conservative treatment consisting of light-duty restrictions, medication, and physical therapy. Plain x-rays and a CT scan were performed and they revealed adequate healing of the previous Colles fracture. The plate and screws remained intact and well-placed. A 3-phase bone scan was also performed which showed no significant abnormality. An EMG performed by Dr. Jennifer Finley was also within normal limits.

Claimant was off work from August 16, 2010, through March or April 2011. Thereafter claimant apparently returned to work for a period of time. However, when claimant tried to again return to work in approximately June 2011 with Dr. Fevurly’s restrictions she was told by the store manager, Mike Campbell, that she would not be allowed to return to work until she was without pain and had no restrictions.<sup>9</sup>

Claimant was examined by Dr. Michael J. Schmidt on September 19, 2011. Dr. Schmidt recommended a referral to a hand surgeon or a return to Dr. Wallace for exploration of the ulnar nerve at the wrist and/or hardware removal. Claimant testified she has more problems taking care of her children, changing diapers, opening lids, driving and working since her accident on August 16, 2010. Dr. Schmidt expressed his opinion that “[t]his condition is definitely related to her previous fracture and subsequent volar plating and would not have occurred [sic] otherwise.”<sup>10</sup>

Dr. Schmidt further opined:

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<sup>7</sup> *Id.* at 10-11.

<sup>8</sup> *Id.*, Cl. Ex. 4 at 22.

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.*, Cl. Ex. 2 at 6.

The “pop” that Amanda McCarthy felt while lifting a full coffee pot on 8/16/2010 resulted from one of her flexor tendons snapping over either bony callus or the edge of her volar fracture plate. It is my opinion that were it not for the prior surgery and injury, that simple lifting of this coffee pot would not have resulted in any wrist injury. Though I admit that her wrist condition may have been temporarily aggravated by this lifting incident, I do not believe that it would have caused her any permanent pain or disability were it not for her previous fracture and subsequent treatment.<sup>11</sup>

Dr. Edward Prostic, an orthopedic surgeon, examined claimant on December 5, 2011. In Dr. Prostic’s opinion, “[o]n or about August 16, 2010, Amanda McCarthy sustained injury to her left wrist during the course of her employment.”<sup>12</sup> Dr. Prostic noted that claimant continues to have significant neurologic symptoms that appear to be from both the thoracic outlet and wrist. In Dr. Prostic’s opinion, claimant’s wrist symptoms “may be from retained hardware and/or injury to the triangular fibrocartilage complex.”<sup>13</sup> Dr. Prostic recommended a repeat EMG, following which claimant may require removal of the hardware in her left wrist, a left carpal tunnel release, and an arthroscopy of the left wrist.

#### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>14</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts associated with each case.<sup>15</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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<sup>11</sup> *Id.*, Cl. Ex. 2.

<sup>12</sup> *Id.*, Cl. Ex. 1 at 3.

<sup>13</sup> *Id.*

<sup>14</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>15</sup> *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206. *rev. denied* 287 Kan. 765 (2008).

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>16</sup>

In *Bryant*,<sup>17</sup> the Kansas Supreme Court recently stated, following a detailed discussion of the holdings of a number of Kansas appellate court opinions involving "arising out of" issues:

Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law § 1.03[1] (2011).

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement—bending, twisting, lifting, walking, or other body motions—but looks to the overall context of what the worker was doing—welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

An accidental injury is compensable under the Workers Compensation Act even when the accident only serves to aggravate or intensify a preexisting condition.<sup>18</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>19</sup>

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<sup>16</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

<sup>17</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011).

<sup>18</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>19</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>20</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>21</sup>

### ANALYSIS

Based on the evidence introduced to date, the undersigned Board member finds claimant has satisfied her burden to prove that she sustained personal injury by accident arising out of and in the course of her employment with respondent on August 16, 2010. The accidental injury occurred when claimant lifted a coffee pot at the express direction of her assistant manager. Claimant was at work and in the service of respondent when the accident occurred. The task claimant was performing was specifically connected to the requirements of her job.

The ALJ correctly determined that claimant's accidental injury on August 16, 2010, caused an aggravation of the condition of claimant's left forearm. Claimant did sustain a left wrist fracture on May 10, 2010, however, that injury was successfully treated surgically by Dr. Wallace. There is evidence that claimant had some degree of residual symptoms from that injury, however, claimant suffered a significant increase in her left hand and forearm symptoms on the date of accident. Specifically, claimant experienced a snapping and a grinding sound in the left wrist; a burning in her left upper extremity; a stabbing sensation in the left wrist; and numbness in her small finger, ring finger, and thumb on the left hand. According to claimant, her symptoms on August 16, 2010 were "very much" more intense than she had experienced before.<sup>22</sup> Claimant's testimony is relevant to the issue of her physical condition.<sup>23</sup>

When claimant returned to work for respondent in July 2010, she was still under light-duty restrictions issued by Dr. Wallace, however, those restrictions were only temporary. By the time claimant's accident occurred she was back performing her "regular routine."<sup>24</sup>

Claimant's testimony about the worsening of her left hand and forearm symptoms is corroborated by the medical evidence. Dr. Prostic states that before the lifting incident, claimant "was doing quite well from that (the previous fracture) but for some residual

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<sup>20</sup> K.S.A. 44-534a.

<sup>21</sup> K.S.A. 2010 Supp. 44-555c(k).

<sup>22</sup> P.H. Trans. at 12.

<sup>23</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1997).

<sup>24</sup> P.H. Trans. at 32.

numbness and tingling of the ring and little fingers.”<sup>25</sup> Although Dr. Prostic’s report is somewhat ambiguous, he does clearly opine that claimant sustained an injury to her left wrist on that date, resulting in “significant neurologic symptoms that appear to be from both the thoracic outlet and wrist.”<sup>26</sup>

Dr. Fevurly states in his treatment records that it is pretty clear that claimant sustained an acute aggravation of the preexisting left wrist syndrome. With regard to claimant’s wrist before the August 16, 2010, accidental injury, Dr. Fevurly states in his December 22, 2010 chart entry, referring to Dr. Wallace’s records:

She was followed by Michael Smith, M.D. and then by Brett Wallace, M.D. and it was felt that she had adequate healing of the fractures with no evidence for loss of range of motion, no power deficits, and in fact by May 17, 2010 Dr. Wallace was stating that the swelling had “largely resolved” and there were no neurological deficits identified.<sup>27</sup>

Dr. Schmidt indicates that claimant did “fairly well” following her fracture repair by Dr. Wallace.<sup>28</sup> Dr. Schmidt admitted in his narrative report that claimant’s left wrist may have been temporarily aggravated, but he did not believe that the accident caused any permanent pain or disability. Assuming without deciding that Dr. Schmidt correctly characterizes the August 16, 2010 event as only causing a temporary aggravation, the claimant is entitled to medical treatment and temporary total disability compensation if the temporary aggravation results in the need for those benefits. An injury does not have to cause permanent disability to be compensable. The extent of claimant’s permanent disability, if any, is not yet an issue in this claim.

Drs. Schmidt, Prostic and Fevurly, all discuss the potential need for removal of the hardware in claimant’s left forearm, but there was no discussion of the need for such surgical treatment before August 16, 2010. There is likewise no indication that claimant required additional plain x-rays, a CT scan, a bone scan, or NCV testing before August 16, 2010. There is no evidence suggesting that claimant snapped a flexor tendon in her left hand before that date of the work-related accident. Before August 16, 2010, no physician suggested that claimant may have thoracic outlet syndrome or carpal tunnel syndrome. There was no diagnosis of possible injury to claimant’s triangular fibrocartilage complex before the date of accident.

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<sup>25</sup> *Id.*, Cl. Ex. 1 at 1.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*, Cl. Ex. 4 at 21.

<sup>28</sup> *Id.*, Cl. Ex. 2 at 3.

Respondent emphasizes Dr. Schmidt's opinion that claimant's injury would not have occurred but for the preexisting left wrist injury. However, the issue in this claim is not whether the injury would not have occurred but for the preexisting condition. Rather, the issue is whether the accident served to aggravate, accelerate, or intensify claimant's prior left wrist injury. The preponderance of the credible evidence establishes that there was an aggravation of claimant's preexisting condition and that, moreover, the accident caused a new injury unrelated to claimant's prior fracture.

Respondent maintains that the Kansas Court of Appeals case of *Logsdon*<sup>29</sup> requires a denial of compensation. Respondent argues that claimant's accident on August 16, 2010, was the natural and probable consequence of the previous left forearm fracture. *Logsdon* and the numerous other appellate cases dealing with the "direct and natural consequence rule" concern whether an injury occurring after a compensable primary injury is also compensable. The circumstances in this claim are not comparable to those in *Logsdon*, nor does respondent cite any case law indicating that *Logsdon* has any applicability here.

#### **CONCLUSION**

Claimant sustained her burden to prove that she sustained personal injury by accident arising out of and in the course of her employment with respondent on August 16, 2010.

**WHEREFORE**, the undersigned Board Member finds that the January 5, 2012, preliminary hearing Order entered by ALJ Rebecca A. Sanders is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2012.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent  
Rebecca A. Sanders, Administrative Law Judge

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<sup>29</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).